140

(3)

No. 09-3

In the Supreme Court of the United States

DAEWOO ENGINEERING & CONSTRUCTION CO., LTD.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
JEANNE E. DAVIDSON
DONALD E. KINNER
J. REID PROUTY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, a government contractor may submit a claim for a contract adjustment if the contractor believes the government is liable for an additional amount. 41 U.S.C. 606. The Act provides that, "[i]f a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim." 41 U.S.C. 604. The question presented is as follows:

Whether petitioner is liable under the CDA for the full amount of the part of its claim that was found to be fraudulent without question.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 5
Conclusion 11

TABLE OF AUTHORITIES

Statutes:

Contract Disputes Act, 41 U.S.C. 601 *et seq.* 2
41 U.S.C. 604 ..... 2, 4, 5
41 U.S.C. 605 2
41 U.S.C. 605(c)(1) 2, 10
41 U.S.C. 606 2
41 U.S.C. 607(g) 10
41 U.S.C. 609 ..... 2, 4, 10

Miscellaneous:

S. Rep. No. 1118, 95th Cong., 2d Sess. (1978) 5, 10

In the Supreme Court of the United States

No. 09-3

DAEWOO ENGINEERING & CONSTRUCTION CO., LTD.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-21a) is reported at 557 F.3d. 1332. The opinion of the United States Court of Federal Claims (Pet. App. 22a-153a) is reported at 73 Fed. Cl. 547.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2009. A petition for rehearing was denied on April 27, 2009 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on June 26, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Contract Disputes Act (CDA), 41 U.S.C. 601 *et seq.*, authorizes federal contractors to seek reimbursement from the United States for additional contract costs that they believe should be the responsibility of the government, and it delineates the process by which such claims must be submitted and considered. 41 U.S.C. 605. When a contractor seeks an amount in excess of $100,000, it must certify that the claim is made in good faith, that the data supporting the claim are accurate and complete, and that the amount requested accurately reflects the amount of money for which the contractor believes the government is liable. 41 U.S.C. 605(c)(1). If a contractor is dissatisfied with an agency's disposition of its claim, it may seek review of such disposition through appeal to either the appropriate board of contract appeals or the United States Court of Federal Claims. 41 U.S.C. 606, 609.

The CDA provision at issue in this case states in pertinent part:

> If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim.

41 U.S.C. 604.

2. In 1998, the United States Army Corps of Engineers (Corps) solicited bids to build a 53-mile road around the island of Babeldaob in the Republic of Palau. The government estimated that the cost of constructing the road would be between $100 million and $250 million. Petitioner Daewoo Engineering and Construction Co.

submitted by far the lowest bid, estimating the cost of the project at $73 million. After the government questioned the price, petitioner submitted a revised bid of $88.6 million. The government awarded the contract to petitioner. Pet. App. 4a.

The contract specified that the road should be completed within 1080 days (just under three years), beginning in October 2000. Pet. App. 4a. Construction of the road was delayed, however, for reasons that petitioner attributed to Palau's moist soil and humid and rainy weather. *Ibid.* After discussing the delays with petitioner, the government agreed to reduce the amount of soil compaction specified in the contract for certain parts of the road in order to "allow[] increased productivity" on petitioner's part. *Ibid.*; *id.* at 43a.[1]

3. On March 29, 2002, well before completion of the contract, petitioner submitted to the contracting officer a certified claim seeking equitable adjustment pursuant to the CDA. Pet. App. 4a, 50a. Petitioner's claim sought adjustment of the contract price and the time to perform the contract, alleging that "defective" specifications in the contract had misled it and increased its costs of performance. *Id.* at 4a-5a, 50a. The claim sought approximately $13.3 million for costs that petitioner alleged it had already incurred, and an additional $50.6 million for future costs "not yet incurred." *Id.* at 5a, 50a. The Corps denied the claim. *Id.* at 5a, 51a.[2]

---

[1] Soil must generally be dry in order to achieve compaction, a task that can prove challenging in Palau's tropical climate. Pet App. 24a-25a & n.2.

[2] In its appeal to the Federal Circuit, petitioner contended that the $50.6 million future-costs component of its claim was not actually a claim, but was merely a projection of costs. Upon consideration of the claim document itself, the testimony of petitioner's claim-certifying

4. Pursuant to 41 U.S.C. 609, petitioner then filed suit in the Court of Federal Claims seeking review of the contracting officer's final decision and requesting an award of approximately $64 million. Pet. App. 5a, 51a. The Court of Federal Claims held a 13-week trial, during which the government filed counterclaims for damages, seeking, *inter alia*, $64 million under the CDA. *Id.* at 23a, 51a, 111a-112a. The Court of Federal Claims concluded that the government had proved "by clear and convincing evidence that [petitioner] knowingly presented a false claim with the intention of being paid for it." *Id.* at 5a-6a (internal citation omitted). The court awarded the government a $50.6 million penalty under the CDA, as well as $10,000 under the False Claims Act and forfeiture of petitioner's claims. *Id.* at 6a.

5. The court of appeals affirmed. Pet. App. 3a-21a. The court upheld the Court of Federal Claims' determination that the $50.6 million future-costs part of petitioner's certified claim was fraudulent and its award of a penalty in that amount. *Id.* at 12a-18a.

The court of appeals explained that petitioner's "damages experts at trial treated the certified claim computation as essentially worthless, did not utilize it, and did not even bother to understand it." Pet. App. 14a. The court further observed that petitioner had made "virtually no effort to show that the Court of Federal Claims' findings of fraud are clearly erroneous." *Id.* at 15a. The court also rejected petitioner's argument that a claim is fraudulent for purposes of 41 U.S.C. 604 only if it rests upon false facts rather than on a baseless

---

official, and the text of the complaint filed to begin this lawsuit (which described the certified claim as a "total monetary damage claim of $63,978,648.95"), the Federal Circuit rejected that argument. Pet. App. 7a-12a. Petitioner does not challenge that determination here.

calculation. Pet. App. 16a-17a. The court of appeals explained that Congress had enacted Section 604 "out of concern that the submission of baseless claims contribute[s] to the so-called horsetrading theory where an amount beyond that which can be legitimately claimed is submitted merely as a negotiating tactic." *Id.* at 17a (brackets in original) (quoting S. Rep. No. 1118, 95th Cong., 2d Sess. 20 (1978)).[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. And while the Federal Circuit has exclusive appellate jurisdiction over suits brought under the CDA, petitioner identifies no basis for concluding that the question presented here arises with any frequency. Further review is not warranted.

1. The court of appeals correctly affirmed both the Court of Federal Claims' conclusion that the part of petitioner's claim for $50.6 million in future costs was fraudulent, and its decision to award a penalty in that amount under the CDA. Section 604 provides that "[i]f a contractor is unable to support any part of his claim" due to "fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim." 41 U.S.C. 604. In this case, the Court of Federal Claims properly awarded a penalty of $50.6 million based on its finding that the future-damages part of petitioner's claim was fraudulent in its entirety.

---

[3] The court of appeals also upheld the Court of Federal Claims' determinations that petitioner had violated the False Claims Act and that petitioner had failed to prove its affirmative claims. Pet. App. 18a-21a. Petitioner does not challenge those holdings.

a. Petitioner contends that the Court of Federal Claims found that only "certain specific items" in the future-costs part of petitioner's claim were unsupported, see Pet. 9 (citing Pet. App. 140a n.80), but that the court nevertheless awarded as a penalty the full amount of the future costs that petitioner demanded rather than the amount of the specific unsupported items. That contention reflects a misunderstanding of the Court of Federal Claims' opinion.

The phrase "certain specific items" does not appear on the cited page of the Court of Federal Claims' opinion, but rather in the opinion of the court of appeals. See Pet. App. 12a n.5. Moreover, the court of appeals used that phrase to describe the findings of a government-retained expert, not the findings of the Court of Federal Claims. See *ibid.* The Court of Federal Claims noted that "[s]ome" of the sources of specified errors in petitioner's claim, as well as "other errors," were identified in that expert's report. *Id.* at 140a n.80. The court did not suggest, however, that the specific errors identified in the expert report represented the universe of errors in petitioner's claim, let alone the sole basis for the court's finding of fraud.

On the contrary, the Court of Federal Claims stated repeatedly that it found the future-damages part of petitioner's claim—*in its entirety*—to be fraudulent. The court first concluded that petitioner's "entire $64 million claim was an attempt to defraud the United States" because petitioner "in fact did not believe that the Government owed it $64 million as a matter of right." Pet. App. 119a-120a; *id.* at 121a-122a ("The certified claim itself was false or fraudulent and [petitioner] knew that it was false or fraudulent."). In considering how to measure damages, the court concluded that "[t]he 'part of

[the] claim' that is fraudulent without question is $50,629,855.88," the part of petitioner's claim relating to alleged future damages. *Id.* at 148a (second brackets in original). The court noted that petitioner's own witnesses, including the official who had certified the claim, testified that the purpose of the future-damages part of the claim was to get the government's attention and to pressure the government to accede to petitioner's demands. *Id.* at 148a, 150a. Although the court suspected that the part of petitioner's claim relating to past damages was fraudulent as well, it did not assess a penalty for that amount because "it [was] difficult to locate the line between fraud and mere failure of proof" as to that portion of petitioner's claim. *Id.* at 149a. Instead, because the court had no doubt that the $50 million future-damages part of petitioner's claim was not submitted in good faith and did not represent "an amount to which [petitioner] honestly believed it was entitled," the court properly assessed a penalty for that amount. *Id.* at 150a.

Because the lower courts found that the $50.6 million future-damages part of petitioner's claim was fraudulent in its entirety, and because petitioner does not directly challenge the factual findings on which that conclusion is based, the question presented in the petition is not actually implicated here. Contrary to petitioner's contention, the Court of Federal Claims did measure the penalty by the "amount by which the claim is found to overstate the government's liability" (Pet. i), and the court of appeals properly affirmed that determination. The Court of Federal Claims did not, as petitioner suggests (Pet. 10), deem the penalty calculation "unnecessary." On the contrary, the court separated out the portion of the claim for past damages—which the court de-

termined was probably, but not definitely, fraudulent—and awarded a penalty equal only to the amount of the demand for future damages, which the court had determined was fraudulent in its entirety.

b. In concluding that petitioner's demand for $50.6 million in future damages was fraudulent in its entirety, the courts below did not simply rely on their determination that petitioner knew it was not entitled to payment in that full amount. Rather, those courts explained that petitioner had made no meaningful effort to identify or substantiate any sums to which it *was* entitled. Thus, the court of appeals explained that petitioner's "damages experts at trial treated the certified claim computation as essentially worthless, did not utilize it, and did not even bother to understand it." Pet. App. 14a. The courts below observed as well that petitioner's "claim preparation witnesses inconsistently referred to and interchanged actual, future, estimated, calculated and planned costs." *Ibid.* The Court of Federal Claims found not only that petitioner knew the $50.6 million total to be excessive, but that petitioner "did not honestly believe that the Government owed it *the various amounts* stated when it certified the claim." *Id.* at 133a (emphasis added); see *id.* at 14a.

Because the courts below did not view the future-damages part of petitioner's claim as including both valid and fraudulent line items, or as otherwise containing valid portions that could be severed from the remainder of that part of the claim, they appropriately treated that part of the claim as fraudulent in its entirety for purposes of Section 604. In the court of appeals, petitioner made "virtually no effort to show that the Court of Federal Claims' findings of fraud [we]re clearly erroneous" as to the $50.6 million demand for

future damages. Pet. App. 15a. Although petitioner suggests that some unspecified portion of its demand for future damages was "at least non-fraudulent," Pet. 9, this Court is not a proper arena in which to reassess factual findings made by a trial court after a 13-week trial and based in significant part on credibility determinations. *E.g.*, Pet. App. 54a-55a, 74a-90a, 149a.[4]

If a contractor's fraudulent demand for payment reflects no reasonable effort to identify and substantiate the facts bearing on the contractor's entitlement to federal funds, the government is entitled under the CDA to damages in the full amount of the demand, even if the contractor might have been able to prepare and file a *different* claim that established its entitlement to a lesser sum. That conclusion follows from the plain language of Section 604, which renders a contractor in those circumstances "liable to the Government for an amount equal to [the] unsupported part of the claim." As the analysis of the courts below makes clear, the $50.6 million future-damages part of the claim that petitioner actually submitted was "unsupported" in its entirety because it was baseless and submitted as a negotiating ploy rather than based on a good faith belief that petitioner was entitled to future damages. Even if petitioner could now demonstrate after the fact that it was entitled to some amount of federal money, that would

---

[4] Petitioner appears to suggest in passing (Pet. 9 n.2) that its demand for future damages was found to be fraudulent because it was a projection of future costs. That assertion is contradicted by the decisions below. See Pet. App. 8a-9a (acknowledging that the CDA permits a contractor to submit a claim for future costs); *id.* at 132a-133a (recognizing that a contractor may submit a claim that includes future costs).

not prove that the future-damages part of the claim previously submitted was "supported" in any respect.

As the court of appeals recognized, Congress required in the CDA that a contractor claiming more than $100,000 in damages attest under oath "that the claim is made in good faith * * * and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable," 41 U.S.C. 605(c)(1), in order to prevent contractors from doing exactly what the lower courts found petitioner did here. Pet. App. 17a. Congress sought to penalize contractors who submit claims seeking "an amount beyond that which can be legitimately claimed * * * merely as a negotiating tactic." S. Rep. No. 1118, *supra*, at 20. That is precisely what petitioner did in this case, and the courts below applied the CDA as Congress intended.

2. The decision below does not conflict with any decision of another court of appeals. While petitioner correctly observes (Pet. 7) that the Federal Circuit has exclusive appellate jurisdiction over appeals under the CDA (see 41 U.S.C. 607(g), 609), petitioner identifies no basis for concluding that the question presented here has arisen or will arise with any frequency. And because the decision below is merely a straightforward application of the fraudulent claims provision of the Contract Disputes Act, it will not have the effect of deterring government contractors from submitting legitimate claims for contract adjustments as petitioner suggests. Pet. 12-14. On the contrary, the decision below will deter contractors from submitting baseless claims merely as a negotiating ploy—which is exactly what Congress intended by enacting that provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
JEANNE E. DAVIDSON
DONALD E. KINNER
J. REID PROUTY
Attorneys

SEPTEMBER 2009